

Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT
NO C2-23-4108-86
SHANKAR J
10 FEBRUARY 1988

Civil Procedure – Conditional leave to defend – Appeal against – Whether leave of court should have been obtained before suit was filed – Claim for unliquidated damages – O 14 wholly inappropriate – Whether triable issues raised

Leasing – Equipment leasing – Hirer has no title to equipment, only licence to use equipment – Title does not pass to receivers when hirer is under receivership

The first defendant entered into a leasing agreement with the plaintiffs for the lease of certain equipment. It defaulted in making the first payment and continued in default. In November 1984, it went into receivership and the plaintiffs repossessed the equipment. However, the plaintiffs did not succeed in selling the equipment until 1986. After repossession, the plaintiffs sued for the remaining instalments unpaid and in an O 14 application, the senior assistant registrar granted conditional leave to defend to the third defendant, who was a guarantor to the leasing agreement. The third defendant appealed to the High Court, contending that unconditional leave should instead be granted. He submitted that: (a) the plaintiffs' action was bad since under s 226 of the Companies Act 1965, leave of the court should have been obtained before this suit was filed; (b) the plaintiffs' repossession was invalid as title to the equipment had passed to the receivers when the defendant company was placed under receivership; (c) cl 8 of the agreement which purportedly gave the plaintiffs a right to sue for all that they have sued for in this case was in fact a penalty clause which was oppressive and unconscionable. The third defendant thus argued that there was an issue to be tried on the question of what reasonable compensation the plaintiffs were entitled to by way of damages. As to the third contention, the plaintiffs contended that since liability was not disputed and the question was purely one of quantum, the court should nevertheless enter judgment for the plaintiffs and leave damages to be assessed.

Held, allowing the third defendant's appeal:

(1) The court does not agree with the first contention. Leave under s 226 of the Companies Act would only be required if the company had been wound up or a provisional liquidator was appointed by the court.

(2) The second contention also fails. The case here is not concerned with a hire-purchase agreement where there is an option to purchase or some other kind of agreement where some title to the goods is vested in the hirer. In this case it was a leasing agreement pure and simple and the hirers had no title to the goods whatsoever, only a licence to use the equipment whilst the agreement was enforced.

(3) The claim for the plaintiffs was not one for a liquidated demand. In this kind of claim the action is for unliquidated damages and O 14 is wholly inappropriate. One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation. What is reasonable in any particular case is more than a matter of mathematics.

(4) The long delay between the date of repossession and the date of sale did raise a triable issue as to whether the

A plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

[*Editorial Note*: The plaintiffs appealed to the Supreme Court vide Civil Appeal No 73 of 1988. The Supreme Court (comprising Abdul Hamid LP, Mohamed Azmi and Harun SCJJ) dismissed the appeal on 10 April 1989.]

B

Cases referred to

- 1 *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155 (refd)
- 2 *Lombard North Central plc v Butterworth* [1987] 1 All ER 267 (refd)
- 3 *O'Dea & Ors v Allstates Leasing System (WA) Proprietary Ltd & Ors* (1982-83) 152 CLR 359 (foldd)

C

Legislation referred to

Companies Act 1965 s 226
Contracts Act 1950 s 75
Rules of the High Court 1980 O 14

D

WM Chang for the plaintiffs.
Philip Nainan for the third defendant.

Cur Adv Vult

Shankar J: In this case I had granted conditional leave to defend to the third defendant in an O 14 application. The third defendant is a guarantor to a leasing agreement. He applied for further argument in open court.

E

The total rental payable under the leasing agreement was \$229,759.84. This was payable in 36 instalments. The first defendant, the principal debtor under the leasing agreement, defaulted in making the first payment from 9 May 1984. The first defendant continued in default. On 17 November 1984 the first defendant went into receivership under a debenture. On 27 November 1984 the plaintiffs repossessed. But they did not succeed in selling the equipment until 27 March 1986.

F

After repossession they sued for the 35 remaining instalments unpaid, interest charges on these unpaid amounts up to the sale, ie on 27 March 1986, and they claimed for various other charges.

G

Mr Philip Nainan of counsel for the third defendant took the following points as to why unconditional leave should be granted.

H

Firstly it was submitted that under s 226 of the Companies Act 1965, leave of the court should have been obtained before this suit was filed. Since it was not, the entire action was said to be bad. With this submission I do not agree. Leave under s 226 of the Act would only be required if the company had been wound up or a provisional liquidator appointed by the court.

I

The second point which he made was that by virtue of the receivership on 17 November title to the equipment had passed to the receivers. Therefore the repossession on 26 November was said to be bad. With this submission also I do not agree. We are not concerned

here with a hire-purchase agreement where there is an option to purchase or some other kind of agreement where some title to the goods is vested in the hirer. In this case it was a leasing agreement pure and simple and the hirers had no title to the goods whatsoever, only a licence to use the equipment whilst the agreement was enforced. Consequently the second point also fails.

The third point raised by Mr Philip Nainan is on s 75 of the Contracts Ordinance Act 1950 and the cases of *Wearne Brothers (M) Ltd v Jackson*¹ and *Lombard North Central plc v Butterworth*.² The submission was that cl 8 of the agreement which purportedly gave the plaintiffs a right to sue for all that they have sued for in this case was in fact a penalty clause which was oppressive and unconscionable. So he submitted that there was an issue to be tried on the question of what reasonable compensation the plaintiffs were entitled to by way of damages. With this submission I entirely agree. I drew the attention of counsel to the Australian High Court case of *O'Dea & Ors v Allstates Leasing System (WA) Proprietary Ltd & Ors*.³ That case is right on point. Mr Chang of counsel for the plaintiffs was unable to distinguish it and on this ground alone unconditional leave to defend followed as a matter of course.

Mr Chang sought to submit that since liability was not disputed in this case and the question was purely one of quantum, the court should nevertheless enter judgment for the plaintiffs and leave the damages to be assessed. In this case he submitted that the assessment would

A be academic because the amount claimed by the plaintiffs accurately represented what they were entitled to under the terms of the agreement.

B I was totally unable to accept the submission. The claim for the plaintiffs was not one for a liquidated demand. In this kind of claim the action is for unliquidated damages and O 14 is wholly inappropriate. One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation. What is reasonable in any particular case is more than a matter of mathematics.

C The last point which Mr Nainan urged was also a triable issue. The long delay between the date of repossession and the date of the sale did raise a question as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

D In the circumstances I allowed the third defendant's appeal from the decision of the senior assistant registrar and gave unconditional leave to defend. I also ordered that the costs of this appeal and of the application before the senior assistant registrar be taxed and paid by the plaintiffs to the third defendant in any event.

E *Appeal allowed.*

Solicitors: *Mah-Kok & Din; Philip Nainan & Co.*

Reported by *Ng Sheau Jiuan*